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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 389

ALVAH HOVEY WEATHERS,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES ALVAH HOVEY WEATHERS and respectfully shows to this Honorable Court as follows:

Petitioner prays that Writ of Certiorari issue to review the order of the Supreme Court of the State of Florida, entered on July 15, 1952, denying his Petition for Leave to File Petition for Writ of Error *Coram Nobis* in the Criminal Court of Record in and for Duval County, Flor-

ida, (R. 9), and Order denying Petition for Rehearing dated August 12, 1952. (R. 10.) The Supreme Court of Florida denied said petitions without opinions.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, and Rules of Practice and Procedure in Criminal cases promulgated by this Court.

QUESTION PRESENTED.

Where a Petition for Leave to File Petition for Writ of Error *Coram Nobis* to a lower court, supported by a sworn affidavit, showed that prior to the trial in which the deponent testified as a State's witness, she informed the Assistant County Solicitor that the petitioner herein had nothing to do with counselling, hiring, encouraging, commanding, or exciting the procuring of an abortion by her, but that another party did, and the said Assistant County Solicitor told her that if she testified that it was the petitioner who counselled, hired, encouraged, commanded or excited the performance of an abortion, he would see that she would not be prosecuted; at the trial, the said witness testified to the facts that the Assistant County Solicitor wanted her to testify to, which facts were untrue and known to be untrue by the Assistant County Solicitor when he put her on the stand and had her so testify; did not this course of conduct on the part

of the Assistant County Solicitor deprive the petitioner of his rights under the Constitutions of both the State of Florida and the United States, and was not the Supreme Court of Florida in error when it denied both the original, and the Petition for Rehearing?

SUMMARY AND STATEMENT OF MATTERS INVOLVED.

The petition herein showed that the petitioner had been indicted for accessory before the fact of an alleged abortion in the Criminal Court of Record in and for Duval County, Florida, and was, on June 11, 1951, convicted and sentenced to a term of seven years in the State Prison of the State of Florida. That said conviction was affirmed by the Supreme Court of Florida, and Petition for Rehearing denied. (See *Weathers v. State*, (Fla.) 56 So. 2d 536.)

The Petition herein sets forth that at the time of the trial there existed peculiar facts pertinent to the case, if known to the court, would have prevented the judgment that was renedred. That such facts, though existing at the time, were unknown to the court, and the petitioner and his counsel when judgment was rendered.

The petition and affidavit showed that Evelyn Kriston, alias Evelyn Christian, the prosecutrix, prior to the trial of Alvah Hovey Weathers, had told Albert Datz, Assistant County Solicitor of the Criminal Court of Record in and for Duval County, Florida, that she had never seen

Weathers, had not made any arrangements with him for the securing of an abortion and that he was not present at the time of the alleged abortion, but Albert Datz told her that if she would testify that she had made arrangements with Weathers for the abortion and that she had given the money to him, and that he directed W. W. Winninger, alias W. W. Ziegler to perform the alleged abortion and that Weathers was present at the time of the alleged abortion, he would see that she was not bothered with prosecution. That the other witnesses were going to back up this testimony. That the facts that Datz wanted her to testify to were false and untrue, and so known to be and was done for the purpose of securing the conviction of the said petitioner. That when she testified at the trial of the said Weathers, she testified falsely and untruthfully in that she gave the testimony suggested to her by Albert Datz and did not speak the truth as it actually happened, and as she had previously told Datz. The only reason she testified falsely was that she was sick, nervous and easily frightened, and that the said Datz made her afraid not to testify as he so wanted her to. (R. 1-4.)

Upon presentation of the said Petition in the Supreme Court of Florida, the State of Florida filed in evidence, affidavits of Albert Datz, R. B. Whittington and Helen Poindexter. (R. 4-8.) A careful reading of these affidavits does not show that the information given to the said Datz and others on March 1, 1951 by Evelyn Kriston was the same testimony she gave at the trial in June of 1951. Albert Datz did not specifically deny Evelyn Kriston's sworn statement that after the arrest of

Weathers that he, Datz, spoke to Evelyn Kriston and told her to testify falsely as outlined above.

Albert Datz did not specifically deny that he took Evelyn Kriston out to lunch during the trial and that during said time he told Evelyn Kriston he had got W. W. Winninger to turn State's evidence, and he would testify the same as she would, and that the other witnesses were going to testify in such a way to back up her testimony.

Albert Datz' affidavit said that he spoke to her on June 11, 1951, after handing her a copy of her transcribed interview had on March 1, 1951, but he did not state what his conversation was with her at that time. Datz did not deny that he had talked to her between the date of Weather's arrest and March 1, 1951.

Petition for Rehearing was filed January 24, 1952, specifically raising constitutional points. (R. 9.)

SPECIFICATION OF ERRORS.

The Supreme Court of Florida erred:

1. In not granting Petition for Leave to File a Petition for Writ of Error *Coram Nobis* in the lower court.

2. In denying the petitioner's request for rehearing.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner prays this Honorable Court for writ of certiorari directed to the Supreme Court of the State of Florida, and submits that this is a proper case for the granting of said writ for the following reasons, among others:

Because the Supreme Court of Florida, in denying said Petition and also the petition for rehearing:

(a) Has decided important questions of law in a way in conflict with applicable decisions of the United States Supreme Court, as well as its own decisions.

(b) Has rendered null and void the safeguards of the Fourteenth Amendment to the Constitution of the United States, which provides in part that:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

In view of the foregoing reasons and the supporting brief hereinafter attached, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARGUMENT IN SUPPORT OF PETITION.

The matters set forth in the Petition in the Supreme Court of Florida are matters that are dehor the record

and were not passed upon or considered by the Supreme Court in affirming the judgment of the lower court either on appeal or petition for rehearing.

The time for applying for Certiorari from the Final Judgment of Conviction has expired. (R. 11.) None was taken.

Violation of petitioner's constitutional rights was argued in the Florida Supreme Court on the petition for leave to file a petition in the lower court. The petition for rehearing specifically alleges the violation of petitioner's constitutional rights.

Where a conviction has been affirmed by the Supreme Court of Florida, the trial court cannot entertain an application for, or grant a Writ of Error *Coram Nobis,* without permission duly given by the appellate court. The application for such permission to proceed in the lower court has to make a full disclosure of the specific facts relied on so that the appellate court can construe the facts for itself and ascertain whether, under settled principles pertaining to such writ, the facts alleged, would afford, at least *prima facie,* just ground for application to the lower court for writ of error *coram nobis.* (*Washington v. State,* (Fla.) 110 So. 259.)

In *Mooney v. Holohan,* 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, and *Pyle v. State of Kansas,* 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214, the United States Supreme Court, in reversing both convictions, held that if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of his liberty through a deliberate deception of the court and jury by the presentation of testimony

known to be perjured, such contrivance is as inconsistent with the rudimentary demands of justice as was the obtaining of a like result by intimidation.

Here, the allegations of this petition go further and allege that not only perjured testimony was used and known to be perjured testimony by the prosecuting attorney when he presented such testimony, but that the prosecuting attorney was instrumental in the securing of such perjured testimony by intimidation of the witness.

These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.

The Florida case of *Skipper v. Schumacher,* Sheriff, 169 So. 58, recognized the holdings of the *Mooney* case.

CONCLUSION.

We believe that the petition and attached affidavit, along with the cited authorities make a *prima facie* showing that the facts, if proven true, shows a denial of petitioner's constitutional rights, and that a certiorari should be entered by this Court directing the Supreme Court of Florida to grant leave to file his petition for writ of error *coram nobis* to the trial court, where the matters may be inquired into.

Respectfully submitted,

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